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BEFORE THE ARIZONA CORPORATION COMMISSION

DOUG LITTLE
CHAIRMAN

BOB STUMP
COMMISSIONER

BOB BURNS
COMMISSIONER

TOM FORESE
COMMISSIONER

ANDY TOBIN
COMMISSIONER

**IN THE MATTER OF THE
APPLICATION OF ARIZONA PUBLIC
SERVICE COMPANY FOR A
HEARING TO DETERMINE THE FAIR
VALUE OF THE UTILITY PROPERTY
OF THE COMPANY FOR
RATEMAKING PURPOSES, TO FIX A
JUST AND REASONABLE RATE OF
RETURN THEREON, TO APPROVE
RATE SCHEDULES DESIGNED TO
DEVELOP SUCH RETURN.**

DOCKET NO. E-01345A-16-0036

DOCKET NO. E-01345A-16-0123

**ENERGY FREEDOM COALITION
OF AMERICA'S CONSOLIDATED**

MOTION TO STRIKE REPLY BRIEF

AND

**NOTICE OF LODGING
SUR-RESPONSE**

**IN THE MATTER OF FUEL AND
PURCHASED POWER
PROCUREMENT AUDITS FOR
ARIZONA PUBLIC SERVICE
COMPANY.**

Arizona Public Service Company (the "Company"), in the Reply in support of the Motion to Compel asks for new and different discovery than it had previously sought. This new discovery was not mentioned in any data request; it was not the subject of the personal consultation; and it was not mentioned in the original Motion. Instead the Company simply slipped new discovery requests into a Reply brief on a Motion to Compel. Because the Reply seeks relief not mentioned in its initial Motion, the Commission should strike the Reply.

Because the Company delayed disclosing the relief it truly seeks until a Reply, EFCA, Arizona Corporation Commission hereby provides notice that it is contemporaneously filing a Sur-Response.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 EFCA applied for leave to intervene on July 15, 2016. The Company did not timely object.
3 The Commission granted EFCA leave to intervene on August 1, and that issue is now closed.

4 One hundred days after the Commission resolved that issue, the Company sent data
5 requests for what now appears to be the sole purpose of re-litigating the long since decided
6 intervention request.¹ The Company has litigated an entire Motion to Compel without arguing its
7 discovery is relevant to 1) the value of its property, 2) a fair return on its capital, or 3) a just and
8 reasonable rate. Instead, the sole purpose of this discovery is to re-litigate a procedural issue: the
9 intervention.

10 Upon receipt to the Company's data requests, EFCA did not realize the Company wanted
11 to revisit a concluded issue. In response to the requests, EFCA asserted proper objections based
12 on relevance, privilege, work product, and other confidentiality doctrines. And it tried to avoid
13 another Company-initiated discovery fight by answering some irrelevant questions anyway.

14 Despite its objections, EFCA told the Company who it is and how it operates. It disclosed:

- 15 • Its business and purpose – “EFCA advocates for the proliferation of distributed energy
16 resources (“DERs”) around the country.”²
- 17 • Its members and decision-making body - It listed its members in response to Data Request
18 1.1(b). EFCA is a member-managed LLC, and decisions are made by its members.
- 19 • Who owns EFCA - It listed its members. By law, a limited liability company has no owners
20 other than its members. It also disclosed that its ownership structure does not involve
21 percentages of ownership.

22 During the personal consultation to address discovery issues, the Company quibbled about
23 the objections EFCA preserved, but it never mentioned that it found the answers inadequate or that
24 it had intended to ask different questions than those actually in the data request.

25 As a result of the personal consultation, EFCA provided supplemental information about
26 its funding. In response to the Company's query about its “source of funding,” EFCA disclosed it

27 ¹ Of interest, Barbara Lockwood of APS admitted in her deposition that APS paid the legal fees of two intervenors,
28 AIC and ConservAmerica. And while the Company professes a concern about whether EFCA is the proper party
to intervene, the Company is funding two clones as intervenors.

² See Exhibit 1 (EFCA's response to First Set of Data Requests at 1.1).

1 “is funded by its members.”³ The Company never conducted a personal consultation about that
2 response; it never asked for any additional information. Instead, the Company filed a Motion to
3 Compel claiming, falsely, that EFCA never provided this information. No portion of the initial
4 Motion acknowledged EFCA’s answers or contested their adequacy. So EFCA responded to the
5 Motion that the Company presented. The Company claimed EFCA did not answer, EFCA
6 responded quoting its answers.

7 For the first time, in its Reply the Company complains that EFCA’s answers should have
8 provided supplemental information. Relatedly, the Reply requests new relief. It seeks an order
9 compelling EFCA to provide information that was not sought in the initial data requests and not
10 discussed in the original Motion to Compel.

11 **I. THE COMPANY MAY NOT EXPAND ITS MOTION IN ITS REPLY.**

12 Rule 7.1(a) prohibits parties from slipping new requests for relief into their reply briefs.
13 Replies “shall be directed only to matters raised in the answering memorandum.”⁴ Arizona’s Court
14 of Appeals confirms that a party “may not raise new issues for the first time in its reply brief.”⁵
15 “[T]he rationale of this rule is ‘obvious.’”⁶ “Allowing a moving party to raise an issue for the first
16 time in a reply robs the opposing party of the opportunity to demonstrate that the record does not
17 support the moving party’s factual assertions and/or to present an analysis of the legal issues and
18 precedent that may compel a contrary result.”⁷ The rule also protects the tribunal from committing
19 error when it does “not have the benefit” of the opposing party’s “response.”⁸

20 In fact, Rule 7.1(a) requires that a moving brief - not the reply - “*shall* set forth the relief
21 or order sought.”⁹ The moving brief must also “state *with particularity* the grounds” for seeking
22 relief.¹⁰ Requiring parties to explain their requests in a moving brief prevents sandbagging.

23 //

24
25 ³ See Exhibit 2 (EFCA’s Supplemental Response to APS’ First Set of Data Requests).

⁴ Ariz. R. Civ. P. 7.1(a).

⁵ *Pima County v. INA/Oldfather 4.7 Acres Trust No. 2292*, 145 Ariz. 179, 182, 700 P.2d 877, 880 (App. 1984)

26 ⁶ *Chambers v. Fike*, 13-1410-RDR, 2014 WL 3565481, at *2 (D. Kan. July 18, 2014) (quoting *Stump v. Gates*, 211
F.3d 527, 533 (10th Cir.2000)).

27 ⁷ *Chambers v. Fike*, 13-1410-RDR, 2014 WL 3565481, at *2 (D. Kan. July 18, 2014)

⁸ *Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000)

28 ⁹ Ariz. R. Civ. P. 7.1(a) (emphasis added).

¹⁰ *Id.*

1 **II. PARTIES MUST MEET AND CONFER BEFORE SEEKING COURT ORDERS.**

2 The Company never held a personal consultation about the new requests raised in the
3 Reply. Rule 37(a)(2)(c) and 26(g) require parties to meet and confer before briefing discovery
4 disputes. The Company had a duty to meet and confer regarding the new issues raised in its Reply
5 before presenting them to the Court: it did not do so. The Commission should strike the Reply
6 because it seeks relief the Company never requested or addressed in a personal consultation.

7 **III. THE COMPANY'S REPLY SEEKS IMPERMISSIBLE RELIEF**

8 The Company's Reply seeks new relief impermissible under the Arizona Rules of Civil
9 Procedure or this commissions rules.

10 **A. THE COMPANY DID NOT REQUEST AN ALLOCATION OF EFCA'S FUNDING**
11 **SOURCES.**

12 Prior to filing the Motion to Compel or even in the Motion itself, the Company had not
13 asked EFCA to describe "how funding is allocated amongst the members."¹¹ The initial data
14 request simply asked EFCA to disclose its "source of funding."¹² After the personal consultation,
15 EFCA voluntarily provided that information. The Company's Motion did not discuss this
16 supplemental response. It certainly did not describe "with particularity" why that answer was
17 deficient. Rule 7.1(a) prohibits it from slipping this new request into its reply brief.

18 Relatedly, the Company never held a personal consultation about EFCA's supplemental
19 response. EFCA provided an answer to the data request posed by the Company as a result of an
20 initial discussion with the Company. In light of the Company's meet-and-confer representations,
21 EFCA believed that was an adequate response. Rules 26 and 37 require "good faith efforts" to
22 resolve discovery disputes without court intervention. The Company should have discussed the
23 funding question before starting another discovery fight.

24 **B. THE REPLY MAKES NEW INQUIRIES ABOUT EFCA'S ORGANIZATION.**

25 The Motion claimed "EFCA refused to identify its members." EFCA disclosed the names

26 ¹¹ See APS's Data Request 1.1(a) and APS's Motion to Compel page 5 lines 3 through 9 and page 6, line 21 through
page 7, line 3.

27 ¹² See Exhibit 1. Subsequent to filing the Motion to Compel, the Company did serve a data request seeking
28 information about how much each member of EFCA has contributed, but that data request (#4) is not the subject
of this Motion to Compel and APS should not be permitted to bootstrap subsequent data requests into this Motion
to Compel without first meeting the consultation requirements of Ariz.R.Civ.Proc. 26 and 37.

1 of these members in the very first filing it made in this docket (its Application to Intervene) and
2 again in its initial response to the Company's data request 1.2.¹³ EFCA's Response to the Motion
3 to Compel quoted that list and explained the Company's claim that no members had been disclosed
4 was false.

5 For the first time, the Reply contends that APS did not really want a list of member entities
6 (as the data request states), instead the Company insists it wanted to know "which person(s) is (or
7 are) in charge." The Company's original Motion never explained that it wanted people rather than
8 entities. Nor did the Company disclose that during the personal consultation.

9 Relatedly, the rhetorical questions in the Company's Reply reveal that its real concern is
10 that it has follow up questions on its prior data request, not that EFCA failed to respond. EFCA's
11 response confirmed that there are no senior executives of EFCA. If the Company has further
12 questions about individuals, those questions go far beyond the scope of the data request that is at
13 issue in this Motion to Compel. Rather than slip a new argument into its Reply, the Company
14 should ask the question in a proper data request.

15 **C. THE COMPANY NEVER REQUESTED EFCA'S OPERATING AGREEMENT.**

16 For the first time, the Company's Reply requests an order compelling EFCA to produce its
17 Operating Agreement. The Company did not present this new request for EFCA's Operating
18 Agreement in its Motion to Compel. It did not request the Operating Agreement during the
19 personal consultation. More importantly, the initial data request does not mention that document.
20 Rule 7.1 prohibits the Company from slipping this new request into a reply brief on a motion to
21 compel.

22 **D. THE COMPANY'S MOTION ADMITS EFCA PRESERVED ITS WORK-PRODUCT**
23 **OBJECTION; THE COMPANY'S REPLY MAY NOT RENEGE ON THAT ADMISSION.**

24 The Company's initial Motion admits EFCA properly raised its work-product objection to
25 Data Request 1.6. Its moving brief says: "with regard to communications between EFCA and
26 SolarCity, EFCA asserted attorney work product protection."¹⁴ It cannot change positions in its
27 Reply brief and argue EFCA waived work-product protection.

28 ¹³ Exhibit 1.

¹⁴ Motion to Compel at 2-3.

1 **CONCLUSION**

2 The Company's Reply has abandoned the relief it requested in its initial motion. The initial
3 motion accused EFCA of stonewalling discovery. Without explanation, the Company simply
4 contended EFCA refused to answer questions. EFCA's Response to the Motion pointed out that it
5 had answered the questions. It quoted the answers previously given to the Company. Then the
6 Company changed its argument and claimed the answers were insufficient or that different
7 information had been sought. Concealing this argument until the Reply deprived EFCA of a chance
8 to timely respond, and the Commission should strike the Reply.

9
10 Respectfully submitted this 30^h day of December, 2016.

11
12 /s/ Court S. Rich

13 Court S. Rich

14 Rose Law Group pc

15 Attorney for Energy Freedom Coalition of America
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1 **Original and 13 copies filed on**
2 **the 30th day of December, 2016 with:**

3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington Street
6 Phoenix, Arizona 85007

7 *I hereby certify that I have this day served a copy of the foregoing document on all parties of*
8 *record in this proceeding by regular or electronic mail to:*

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EXHIBIT 1

**ENERGY FREEDOM COALITION OF AMERICA'S
RESPONSE TO ARIZONA PUBLIC SERVICE COMPANY'S
FIRST SET OF DATA REQUESTS
APS DOCKET E-01345A-16-0036; E-01345A-16-0123
NOVEMBER 18, 2016**

Questions about EFCA

APS 1.1 1.1(a) Describe EFCA's business, including its purpose, its source of funding, and what EFCA does or seeks to accomplish in relation to the interests of its members and managers.

Objection. EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Arizona Public Service's (the "Company") property and setting the Company's reasonable rate of return. EFCA's purpose, funding, or goals are not relevant to the value of the Company's property or its reasonable rate of return. These issues are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA further objects to this request to the extent it requests funding information on First Amendment grounds. EFCA's advocacy is First Amendment protected speech and the right to fund that speech anonymously is protected. Funding protected speech is also protected under the First Amendment. Forcing EFCA to reveal its funding sources has an unconstitutional chilling effect on free speech. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).

Response: Without waiving any objections and as set forth in its Application to Intervene filed in this docket, EFCA advocates for the proliferation of distributed energy resources ("DERs") around the country.

1.1(b) Provide a list of EFCA's members and members of its Board of Directors or any other governing board or decision-making body.

Objection: EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set a just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. EFCA's members, directors, or board, or decision makers are not relevant to the value of the Company's property or its reasonable rate of return. They are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA objects to this request on First Amendment grounds. EFCA exists to promote the adoption of DERs and its advocacy is First Amendment protected speech. Participating in this proceeding is protected speech, and forcing it to reveal the identities of its leaders would chill free speech. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).

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Without waiving any objections, EFCA is not a corporation and has no board of directors. The phrase "other decision making body" is undefined and susceptible to multiple interpretations.

Response: Without waiving any objections: EFCA is a limited liability company formed in Delaware with the following Members as previously set forth in its Application to Intervene: Zep Solar LLC; Ecological Energy Systems; 1 Sun Solar Electric LLC; Go Solar LLC; Silveo LLC; and Solar City Corporation.

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APS 1.2 1.2(a) Does EFCA sell any products or provide any services?

Objection: EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. A universal demand for information regarding any products or services EFCA provides far exceeds the scope of any information that will assist the commission in its important task. They are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA objects to the phrase "provide any services" as undefined and susceptible to multiple interpretations. It is unclear whether this Request is inquiring about services to consumers or EFCA members.

Response: Without waiving any objections, EFCA advocates for the proliferation of DERs which could be viewed as a service.

1.2(b) If so, describe the product or services it sells, identify to whom and state the annual revenue from the sales.

Objection: EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. A universal demand for information regarding any products or services EFCA provides far exceeds the scope of any information that will assist the commission in its important task. They are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

See the Response to request 1.2(a) above.

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APS 1.3 1.3(a) Does any member of EFCA provide services to or for EFCA, such as accounting, tax, legal, physical resources (office space), and/or consulting?

Objection: EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. A universal demand for information regarding all the services EFCA receives far exceeds the scope of any information that will assist the commission in its important task. They are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA further objects on the basis of confidentiality (ER 1.6) and attorney-client privilege. All legal services it receives from a licensed attorney are confidential and privileged, and EFCA does not consent to disclose what lawyers it uses for advice.

EFCA further objects on the basis of accountant-client privilege. A client's relationship with his CPA is confidential and privileged.

EFCA further objects to the extent this request seeks work-product, which is confidential under Arizona Rule of Civil Procedure 26(b). To the extent EFCA used a consultant, that consulting expert's opinions and work product are confidential. Like their opinions, the identity of consulting experts is confidential and protected from discovery.¹ "The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable."² Because this data request could call for the identities of confidential consulting experts, EFCA objects.

1.3(b) If so, describe with particularity the service being provided and any fees being charged to EFCA.

Objection: EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and

¹ *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 474 (Tex. 1997).

² *In re Ins. Placement Services (Bermuda) Ltd.*, 03-11-00374-CV, 2011 WL 2768825, at *2 (Tex. App. July 14, 2011); accord *Ager v. Jane C. Stormont Hospital and Training School for Nurses*, 622 F.2d 496, 503 (10th Cir.1980) (finding that involuntary "[d]isclosure of the identities of [medical] consultative experts would inevitably lessen the number of candid opinions available as well as the number of consultants willing to even discuss a potential medical malpractice claim with counsel."); *Williams v. Bridgeport Music, Inc.*, 300 F.R.D. 120, 122 (S.D.N.Y. 2014) ("Rule 26 protects the identities of retained consulting experts as privileged unless they are designated to testify and, thus, the Subpoena must be quashed").

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setting the Company's reasonable rate of return. A universal demand for information regarding all the services EFCA receives far exceeds the scope of any information that will assist the commission in its important task. They are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA further objects on the basis of attorney-client privilege. All legal services it receives from a licensed attorney are confidential (ER 1.6) and privileged, and EFCA does not consent to disclose what lawyers it uses for advice.

EFCA further objects on the basis of accountant-client privilege. A client's relationship with his CPA is confidential and privileged. EFCA will not provide any information about its relationship with its accountant.

EFCA further objects to the extent this request seeks work-product, which is confidential under Arizona Rule of Civil Procedure 26(b). To the extent EFCA used a consultant, that consulting expert's opinions and work product are confidential. Like their opinions, the identity of consulting experts is confidential and protected from discovery.³ "The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable."⁴ Because this data request calls for the identities of confidential consulting experts, EFCA objects.

³ *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 474 (Tex. 1997).

⁴ *In re Ins. Placement Services (Bermuda) Ltd.*, 03-11-00374-CV, 2011 WL 2768825, at *2 (Tex. App. July 14, 2011); accord *Ager v. Jane C. Stormont Hospital and Training School for Nurses*, 622 F.2d 496, 503 (10th Cir.1980) (finding that involuntary "[d]isclosure of the identities of [medical] consultative experts would inevitably lessen the number of candid opinions available as well as the number of consultants willing to even discuss a potential medical malpractice claim with counsel."); *Williams v. Bridgeport Music, Inc.*, 300 F.R.D. 120, 122 (S.D.N.Y. 2014) ("Rule 26 protects the identities of retained consulting experts as privileged unless they are designated to testify and, thus, the Subpoena must be quashed").

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APS 1.4 1.4(a) Identify the senior level executives of EFCA.

Objection: EFCA objects because this request is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. A universal demand for information regarding all of EFCA's senior executives is far beyond the scope of that hearing. This is nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers. Further, it is calculated only to harass EFCA's members.

EFCA further objects on First Amendment grounds. EFCA's advocacy is First Amendment protected speech. Participating in EFCA is protected speech, and forcing it to reveal the identities of its leaders would chill free speech. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).

1.4(b) Identify who or what owns EFCA and in what percentage.

Objection: EFCA objects to this request as vague and ambiguous because it fails to define the term "own." To the extent "own" refers to a membership interest, EFCA already disclosed that information above.

The rights of EFCA's members do not translate into percentages, and EFCA cannot answer this question.

EFCA also objects because this request is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. EFCA's equity structure is not relevant to that task.

1.4(c) Which of EFCA's members currently conduct or have conducted business in Arizona?

Objection: EFCA has no information with which it can respond to this Request. This request seeks information not within the possession or control of EFCA. EFCA is a Delaware limited liability company. It has an existence separate and distinct from its member companies. EFCA does not possess any of its member companies' business information. None of the member companies are parties to this proceeding.

EFCA further objects because APS already has this information in its possession. Any company installing rooftop solar in APS territory would submit

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interconnection applications to APS. APS therefore has access to that information without forcing EFCA to conduct original research.

EFCA also objects because this request is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. EFCA's members' business in Arizona is not relevant to determining reasonable rates.

Without waiving any objections, EFCA has posed this question to its Members in the past and can answer that Members Ecological Energy Systems, 1 Sun Solar LLC, and Go Solar LLC, do not do business in Arizona. The other Members have either not responded or may do business in Arizona.

1.4(d) For those EFCA members that currently conduct business in Arizona, how long have they done so?

Objection: EFCA has no information with which it can respond to this Request. This request seeks information not within the possession or control of EFCA. EFCA is a Delaware limited liability company. It has an existence separate and distinct from its member companies. EFCA does not possess any of its member companies' business information. None of the member companies are parties to this proceeding.

EFCA objects to this request as overbroad and unduly burdensome. In order for EFCA to respond to this request it would be necessary to conduct research, perform an investigation, and obtain discovery from its member companies. A party only has to provide information in its possession or under its control, none of the requested information is in EFCA's possession or control.

EFCA also objects because this request is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. EFCA's members' business in Arizona is not relevant to determining reasonable rates.

1.4(e) If any member no longer conducts business in Arizona, identify when they stopped doing so.

Objection: EFCA has no information with which it can respond to this Request. This request seeks information not within the possession or control of EFCA. EFCA is a Delaware limited liability company. It has an existence separate and distinct from its member companies. EFCA does not possess any of its member companies'

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business, revenue, or strategy information. None of the member companies are parties to this proceeding.

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EFCA also objects because this request is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. EFCA's members' business in Arizona is not relevant to determining reasonable rates.

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APS 1.5 1.5(a) How many employees does EFCA have?

Objection: EFCA objects because this discovery request is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. A universal demand for information regarding all of EFCA's employees is far beyond the scope of that hearing. This is nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA further objects on First Amendment grounds. EFCA exists to promote the adoption of DERs, and its advocacy is First Amendment protected speech. Participating in EFCA is protected speech, and forcing it to reveal the identities of its employees would chill free speech. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).

This request is formulated to harass EFCA and has no legitimate basis.

1.5(b) How many of those employees are also employees of one or more EFCA members? If any, which member or members?

Objection: EFCA objects to this discovery request as not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. The potential outside employment of any EFCA personnel is not relevant to this proceeding.

This request is formulated to harass EFCA and has no legitimate basis.

1.5(c) For those EFCA employees that are also employees of an EFCA member, fully describe in detail how costs are allocated between members for those employees.

Objection: EFCA objects to this discovery request as not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. Any agreements among EFCA's members are not relevant to that task. This request is formulated to harass EFCA and has no legitimate basis.

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APS 1.6 Provide all communications and documents exchanged between EFCA and SolarCity regarding APS's rate case.

Objection: EFCA objects to this discovery request in that any responsive documents would be confidential communications between EFCA and its Members. The communications requested among the Members of EFCA, including SolarCity would constitute confidential, litigation work product and is thus not relevant evidence or reasonably calculated to lead to the discovery of admissible evidence.

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APS 1.7 Please provide any and all studies or analysis performed by or for EFCA, or in EFCA's possession, that attempt to predict or in any way analyze the impact of APS's rate proposal (or any part thereof) on:

- a. The ability of EFCA's member companies to sell or lease systems in APS's service territory;
- b. The future rate of adoption of DG in APS's service territory;
- c. The future economics of DG to the customer in APS's service territory; or
- d. The future economics of DG to the solar provider in APS's service territory.

Objection: EFCA objects to the extent that this request calls for the production of confidential work product. This response will be supplemented when and if EFCA becomes aware of any non-confidential responsive documentation.

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APS 1.8 Please provide all work papers associated with any witness sponsored by EFCA contemporaneous with the filing of such witness' testimony.

Response: EFCA will provide along with the filing of its witness testimony.

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EXHIBIT 2

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Questions about EFCA

APS 1.1 1.1(a) Describe EFCA's business, including its purpose, its source of funding, and what EFCA does or seeks to accomplish in relation to the interests of its members and managers.

Objection. EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Arizona Public Service's (the "Company") property and setting the Company's reasonable rate of return. EFCA's purpose, funding, or goals are not relevant to the value of the Company's property or its reasonable rate of return. These issues are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA further objects to this request to the extent it requests funding information on First Amendment grounds. EFCA's advocacy is First Amendment protected speech and the right to fund that speech anonymously is protected. Funding protected speech is also protected under the First Amendment. Forcing EFCA to reveal its funding sources has an unconstitutional chilling effect on free speech. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).

Response: Without waiving any objections and as set forth in its Application to Intervene filed in this docket, EFCA advocates for the proliferation of distributed energy resources ("DERs") around the country.

Supplemental Response:

Without waiving and subject to the forgoing objections, EFCA is funded by its members.

1.1(b) Provide a list of EFCA's members and members of its Board of Directors or any other governing board or decision-making body.

Objection: EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set a just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. EFCA's members, directors, or board, or decision makers are not relevant to the value of the Company's property or its reasonable rate of return. They are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA objects to this request on First Amendment grounds. EFCA exists to promote the adoption of DERs and its advocacy is First Amendment protected

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speech. Participating in this proceeding is protected speech, and forcing it to reveal the identities of its leaders would chill free speech. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).

Without waiving any objections, EFCA is not a corporation and has no board of directors. The phrase "other decision making body" is undefined and susceptible to multiple interpretations.

Response: Without waiving any objections: EFCA is a limited liability company formed in Delaware with the following Members as previously set forth in its Application to Intervene: Zep Solar LLC; Ecological Energy Systems; 1 Sun Solar Electric LLC; Go Solar LLC; Silveo LLC; and Solar City Corporation.

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APS 1.2 1.2(a) Does EFCA sell any products or provide any services?

Objection: EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. A universal demand for information regarding any products or services EFCA provides far exceeds the scope of any information that will assist the commission in its important task. They are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA objects to the phrase "provide any services" as undefined and susceptible to multiple interpretations. It is unclear whether this Request is inquiring about services to consumers or EFCA members.

Response: Without waiving any objections, EFCA advocates for the proliferation of DERs which could be viewed as a service.

1.2(b) If so, describe the product or services it sells, identify to whom and state the annual revenue from the sales.

Objection: EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. A universal demand for information regarding any products or services EFCA provides far exceeds the scope of any information that will assist the commission in its important task. They are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

See the Response to request 1.2(a) above.

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APS 1.3 1.3(a) Does any member of EFCA provide services to or for EFCA, such as accounting, tax, legal, physical resources (office space), and/or consulting?

Objection: EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. A universal demand for information regarding all the services EFCA receives far exceeds the scope of any information that will assist the commission in its important task. They are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA further objects on the basis of confidentiality (ER 1.6) and attorney-client privilege. All legal services it receives from a licensed attorney are confidential and privileged, and EFCA does not consent to disclose what lawyers it uses for advice.

EFCA further objects on the basis of accountant-client privilege. A client's relationship with his CPA is confidential and privileged.

EFCA further objects to the extent this request seeks work-product, which is confidential under Arizona Rule of Civil Procedure 26(b). To the extent EFCA used a consultant, that consulting expert's opinions and work product are confidential. Like their opinions, the identity of consulting experts is confidential and protected from discovery.¹ "The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable."² Because this data request could call for the identities of confidential consulting experts, EFCA objects.

1.3(b) If so, describe with particularity the service being provided and any fees being charged to EFCA.

Objection: EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and

¹ *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 474 (Tex. 1997).

² *In re Ins. Placement Services (Bermuda) Ltd.*, 03-11-00374-CV, 2011 WL 2768825, at *2 (Tex. App. July 14, 2011); accord *Ager v. Jane C. Stormont Hospital and Training School for Nurses*, 622 F.2d 496, 503 (10th Cir.1980) (finding that involuntary "[d]isclosure of the identities of [medical] consultative experts would inevitably lessen the number of candid opinions available as well as the number of consultants willing to even discuss a potential medical malpractice claim with counsel."); *Williams v. Bridgeport Music, Inc.*, 300 F.R.D. 120, 122 (S.D.N.Y. 2014) ("Rule 26 protects the identities of retained consulting experts as privileged unless they are designated to testify and, thus, the Subpoena must be quashed").

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setting the Company's reasonable rate of return. A universal demand for information regarding all the services EFCA receives far exceeds the scope of any information that will assist the commission in its important task. They are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA further objects on the basis of attorney-client privilege. All legal services it receives from a licensed attorney are confidential (ER 1.6) and privileged, and EFCA does not consent to disclose what lawyers it uses for advice.

EFCA further objects on the basis of accountant-client privilege. A client's relationship with his CPA is confidential and privileged. EFCA will not provide any information about its relationship with its accountant.

EFCA further objects to the extent this request seeks work-product, which is confidential under Arizona Rule of Civil Procedure 26(b). To the extent EFCA used a consultant, that consulting expert's opinions and work product are confidential. Like their opinions, the identity of consulting experts is confidential and protected from discovery.³ "The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable."⁴ Because this data request calls for the identities of confidential consulting experts, EFCA objects.

³ *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 474 (Tex. 1997).

⁴ *In re Ins. Placement Services (Bermuda) Ltd.*, 03-11-00374-CV, 2011 WL 2768825, at *2 (Tex. App. July 14, 2011); accord *Ager v. Jane C. Stormont Hospital and Training School for Nurses*, 622 F.2d 496, 503 (10th Cir.1980) (finding that involuntary "[d]isclosure of the identities of [medical] consultative experts would inevitably lessen the number of candid opinions available as well as the number of consultants willing to even discuss a potential medical malpractice claim with counsel."); *Williams v. Bridgeport Music, Inc.*, 300 F.R.D. 120, 122 (S.D.N.Y. 2014) ("Rule 26 protects the identities of retained consulting experts as privileged unless they are designated to testify and, thus, the Subpoena must be quashed").

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APS 1.4 1.4(a) Identify the senior level executives of EFCA.

Objection: EFCA objects because this request is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. A universal demand for information regarding all of EFCA's senior executives is far beyond the scope of that hearing. This is nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers. Further, it is calculated only to harass EFCA's members.

EFCA further objects on First Amendment grounds. EFCA's advocacy is First Amendment protected speech. Participating in EFCA is protected speech, and forcing it to reveal the identities of its leaders would chill free speech. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).

1.4(b) Identify who or what owns EFCA and in what percentage.

Objection: EFCA objects to this request as vague and ambiguous because it fails to define the term "own." To the extent "own" refers to a membership interest, EFCA already disclosed that information above.

The rights of EFCA's members do not translate into percentages, and EFCA cannot answer this question.

EFCA also objects because this request is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. EFCA's equity structure is not relevant to that task.

1.4(c) Which of EFCA's members currently conduct or have conducted business in Arizona?

Objection: EFCA has no information with which it can respond to this Request. This request seeks information not within the possession or control of EFCA. EFCA is a Delaware limited liability company. It has an existence separate and distinct from its member companies. EFCA does not possess any of its member companies' business information. None of the member companies are parties to this proceeding.

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1.4(d) For those EFCA members that currently conduct business in Arizona, how long have they done so?

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EFCA objects to this request as overbroad and unduly burdensome. In order for EFCA to respond to this request it would be necessary to conduct research, perform an investigation, and obtain discovery from its member companies. A party only has to provide information in its possession or under its control, none of the requested information is in EFCA's possession or control.

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1.4(e) If any member no longer conducts business in Arizona, identify when they stopped doing so.

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APS 1.5 1.5(a) How many employees does EFCA have?

Objection: EFCA objects because this discovery request is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. A universal demand for information regarding all of EFCA's employees is far beyond the scope of that hearing. This is nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA further objects on First Amendment grounds. EFCA exists to promote the adoption of DERs, and its advocacy is First Amendment protected speech. Participating in EFCA is protected speech, and forcing it to reveal the identities of its employees would chill free speech. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).

This request is formulated to harass EFCA and has no legitimate basis.

1.5(b) How many of those employees are also employees of one or more EFCA members? If any, which member or members?

Objection: EFCA objects to this discovery request as not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. The potential outside employment of any EFCA personnel is not relevant to this proceeding.

This request is formulated to harass EFCA and has no legitimate basis.

1.5(c) For those EFCA employees that are also employees of an EFCA member, fully describe in detail how costs are allocated between members for those employees.

Objection: EFCA objects to this discovery request as not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. Any agreements among EFCA's members are not relevant to that task. This request is formulated to harass EFCA and has no legitimate basis.

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- a. The ability of EFCA's member companies to sell or lease systems in APS's service territory;
- b. The future rate of adoption of DG in APS's service territory;
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- d. The future economics of DG to the solar provider in APS's service territory.

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APS 1.8 Please provide all work papers associated with any witness sponsored by EFCA contemporaneous with the filing of such witness' testimony.

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